United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-1188

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1188

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN RODRIGUEZ,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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PRELIMINARY STATEMENT

A two-count indictment was founded against defendant-appellant Rodriguez on April 14, 1974, charging him, in Count I, with attempting to evade income taxes for the year 1967 in violation of 26 U.S.C. §7201 by omitting in his 1967 tax return income received "from the purchase and sale of heroin," and, similarly, in Count II, with submitting a false income tax return for the year 1967 in violation of 26 U.S.C. § 720g(1) by failing to report "additional income derived from another business, to wit, trafficking in heroin..." Following his plea of not guilty, he was tried in the United

States District Court for the Southern District of New York before the Honorable Robert L. Carter and a jury. A verdict of guilty was returned as to each count on March 2, 1967. On April 6, 1976, the Court entered judgment sentencing Mr. Rodriguez to two years' imprisonment on Count I and to no sentence on Count II on ground that it was a lesser included offense. The Court below issued no decisions or opinions, reported or otherwise.

On November 30, 1976, a panel of the Court of Appeals consisting of Circuit Judge Van Graafeiland and District Judges Kelleher, of the Central District of California, and Gagliardi, of the Southern District of New York, affirmed the conviction in an opinion by Judge Gagliardi.

Meanwhile, on November 1, 1976, another panel of this Court decided the case of United States v. Cecil Robinson, No. 76-1153 (petition for rehearing and suggestion for rehearing en banc filed on December 23, 1976).

Defendant-appellant herein urges that the Robinson majority would have decided his appeal differently and that in any event the issues tendered by his case are worthy of en banc consideration.

STATEMENT OF FACTS

The facts are stated in the briefs of the parties and in the Argument portion of this petition.

ARGUMENT

I

THE TRIAL COURT'S SUPPLEMENTARY SUPER-*ALLEN* INSTRUCTION IMPROPERLY CURTAILED THE JURY'S LEGITIMATE FACTFINDING FUNCTION BY DIVORCING IT FROM ALL CONSIDERATION OF FAIRNESS, INVITED THE DERELICTION OF ITS FULL RESPONSIBILITIES BY POINTING TO APPELLATE REMEDIES, AND INEVITABLY PLACED INORDINATE PRESSURE ON THE LONE JUROR WHO PROMPTED IT BY DWELLING ON THE JUROR'S SUPPOSED CORRUPTION OF HER OATH BY SHOWING SENSITIVITY TO SUCH INTANGIBLES AS A FAIR TRIAL.

An extraordinary situation arose in this case which the trial judge interpreted as requiring a supplementary instruction packing even more "dynamite," and less balance, than the original *Allen* charge as passed on by the Supreme Court in 1896. A note from the jury advised the Court as follows:

> "One juror in our group feels that the courtroom atmosphere in the entire court was hostile at all times to the defendant's cause of action; therefore we cannot really ever come to a unanimous conclusion since that juror feels a fair trial has not taken place here. Doesn't this mean that we are impossibly locked and unable to give a verdict?"
>
> (Tr.2164)

The Court sent the jurors home for the evening and heard defense counsel the following morning. I suggest at length that the juror's concern may well have involved legitmate aspects of factfinding (Tr.2166-68). The Court then immediately called for the jury and instructed it at great length (Tr.2169-78; reproduced in the Appendix at the same page designations).

In brief, the judge perceived the note as an attack on his own fairness, said, "the essence of the complaint is that a juror feels that the defendant, in the atmosphere in this courtroom, did not obtain a fair trial" (Tr.2169), and proceeded to charge the jury that fairness was none of their concern, that it was the function of the judge to attend to fairness, that the trial was fair, and that if it were not, the Court of Appeals sat to cure this error. Along this path the judge admonished repeatedly those jurors who would "invade" (Tr.2172) the province of fairness that such would "corrupt their oaths" (Tr.2169,2172, 2172, 2173, 2173, 2178), indicated the desirability of reaching a verdict in this "important case" (Tr.2174), emphasized the expense of the trial (Tr.2175,2176) and the necessity of a disposition at some time, announced the "very object and purpose of the jury system...to secure unanimity" (Tr.2176), suggested the need to change opinions

(Tr.2176) and to "yield" judgments in further deliberations (Tr.2177), and misquoted the charge in Allen v. United States, 164 U.S. 492, 501 (1896). On the subject of Allen, the judge also gave the Court's language from the Supreme Court's discussion -- as distinguished from the charge being reviewed -- belittling "blind" stubbornness (Tr.2177-78). See generally, Note, The Allen Charge Dilemma, 10 Amer.Crim.L. Rev. 637, 667 & n.113 (1972).

We presume the great coercive pressure placed upon the lone juror who had prompted the charge is manifest. The very problem the majority identified in United States v. Cecil Robinson, No. 76-1135, Nov. 1, 1976, 6037 at 5929-30 n.14, exists in this "lone holdout" case so that even the giving of an unmodified Allen charge would have been terribly coercive to her. Furthermore, although the trial court did not give a second Allen type charge in terms, his response to the jurors subsequent deadlock note that they should continue deliberating must have been perceived by all as a reaffirmation of the previous charge (Tr.2192-94). The following points are briefly added:

1. The Judge may well have misconceived what was troubling the juror. By taking a lawyer's view of what a "hostile" courtroom and a "fair trial" portend, he may have overlooked the lay understanding of these terms. In any event, the jury's proper function in factfinding cannot be pried apart in mech-

anical fashion from the judge's function in ruling on law. Notions of fairness permeate both roles.

2. The judge further undermined the jury by directing its attention to the existence of an appeals court and its remedial function. Such reference could only invite the jury to take its responsibilities less seriously and constitutes grounds for reversal. United States v. Fiorito, 300 F.2d 424, 427 (7th Cir. 1962); see United States v. Greenberg, 445 F2d. 1158, 11962 (2d Cir. 1971) (unobjected to reference to appeals court not reversible error, but "better procedure" to avoid such hazards).

3. The panel's reliance on the fact of a subsequent request for testimony does not show that the jury as an entity was deliberating in a responsible and conscientious fashion. We don't know which juror or jurors made the request or for what reason.

4. We assume this Court of Appeals would generally prefer trial judges in the Second Circuit not to invent such problems as arose herein from the Court's warning that the jurors would be "corrupting their oaths" by considering aspects of fairness. We suggest that the Court may not only wish to reverse defendant's conviction but also to consider prescribing the A.B.A. Jury Trial Standards as a substitute for future Allen-type

adventures. Cf. United States v. Domenech, 476 F.2d 1229, 1231-32 (2d Cir.), cert. denied, 414 U.S. 840 (1973); United States v. Beckerman, 516 F.2d 905, 909-10 (2d Cir. 1975). Respectfully, we invite this Court's attention to the cases in other Circuits which have banned Allen and approved the A.B.A. recommendations. United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); United States v. Fioravanti, 412 F.2d 407 (3d. Cir.), cert. denied, 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970); United States v. Silvern, 484 F.2d 879 (7th Cir. 1973) (en banc); contra, United States v. Bailey, 480 F.2d 518 (5th Cir. 1973) (en banc). See generally, Note, The Allen Charge Dilemma, 10 Amer.Crim.L.Rev. 637 (1972). See also, Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 Va.L.Rev. 123 (1967).

5. In any event, because in the instant case the supplementary instruction infringed upon the defendant's Sixth Amendment jury trial right, his conviction should be reversed.

II.

WHEN THE COURT RULED ON THE JURY'S LAST DEADLOCK NOTE WITHOUT NOTIFYING THE PARTIES AND WITHOUT COUNSEL OR THE DEFENDANT PRESENT IT VIOLATED RULE 43 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHTS TO OPEN COURT PROCEEDINGS, TO BE PRESENT AT EVERY STAGE OF THOSE PROCEEDINGS AND TO BE HEARD BY COUNSEL THEREAT.

Following the Allen episode of the previous argument point, the trial judge received another note from the jury describing the circumstances of its continued disagreement. Instead of (1) notifying the defendant and (2) his counsel and (3) giving them the opportunity (4) to appear and (5) to respond, and then instead of (6) having the jury brought to the open courtroom (7) for whatever instructions it deemed appropriate in its informed discretion after hearing from the parties, and (8) after hearing timely exceptions, the Court simply sent in word to them that "I wanted them to continue in their deliberations" (Tr.2193) and advised counsel of this several hours after the fact. This entire episode which violates a panoply of established rights and controvenes all orderly trial procedure, appears succinctly in the transcript:

> "THE COURT: I have a note which I received from the jury while I was in the other case and the answer to which I indicated that I wanted them to continue to deliberate, but I will read the document.
>
> 'Your Honor, we, the members of the jury, were voting on the verdict since 2:30 yesterday when we had ten guilty, one undecided and one not guilty.'
>
> "I can't read that. There is one phrase I can't read, but something on something.
>
> "Maybe it means 'On a further ballot the undecided shifted to guilty and the same juror still votes not guilty. Apart from one juror feeling, first the evidence is insufficient for a verdict of guilty, this juror continues to feel that the trial was conducted

in an atmosphere detrimental to the defendant's cause of action. Accordingly we feel no further deliberations would be fruitful.'

"I sent in word to them that I wanted them to continue their deliberations after I received that note, and I am going to persist in that.

"MR. KRIEGER: Would Your Honor indicate at about what time that note was sent in, please?

"THE COURT: I thought I had indicated that. 3:45."

(Tr.2192-93)

This, we submit, is the antithesis of due process.

In Shields v. United States, 273 U.S. 583 (1927) a unanimous Supreme Court reversed the petitioner's conviction in a case where the jury sent a note communicating inability to agree as to some defendants and the judge on his own sent back a written reply telling the jury they would have to decide as to all defendants. Shields appears to be remarkable indistinguishable from the case at hand. And Shields is still good law.*

In Rogers v. United States, ___U.S.____, 95S.Ct. 2091 (1975) a unanimous Supreme Court, speaking through the Chief Justice, reversed the petitioner's conviction as plain error in a case where the jury sent a note inquiring whether the Court would accept a verdict of "Guilty as charged with extreme mercy of the court" and the judge on his own sent back instructions through the marshal that his answer was affirmative.

* Indeed, it is now buttressed by Rule 43 of the Federal Rules of Criminal Procedure.

Shields is prominently cited, quoted, and relied on in Rogers.

Herein the defendant and his counsel were, among other things, deprived of the substantial right to address advocacy to the trial court's discretion before it acted on the problematical note. See Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919). Counsel may well have argued for declaration of a mistrial because of the jury's failure to agree. He could have argued for supplemental instructions or other measures, if he had been informed. And the instruction to keep deliberating may well have been perceived as a legal instruction reaffirming the trial court's disapproval of the holdout juror's concern over fairness. Thus, the panel did not successfully distinguish Shields and Rogers. The panel also erred in relying upon the absence of an objection. Since the trial judge concluded "and I am going to persist in that" an objection would have been futile and probably perceived as discourteous.

Finally, the panel ignored the constitutional basis of the error, relying on Rule 43 only, and thus did not make the difficult finding that the error was harmless beyond a reasonable doubt.

III.

THE PROSECUTOR VIOLATED THE DEFENDANT'S RIGHTS IN ELICITING EVIDENCE THAT HIS ATTORNEY HAD INVOKED DEFENDANT'S ATTORNEY-CLIENT PRIVILEGE IN A GRAND JURY APPEARANCE.

The prosecutor deliberately and unjustifiably drew attention, over objection, to the fact that Mr. Irwin Zemen, the attorney who had represented the defendant during the crucial property transactions of November 1965, invoked the defendant's attorney-client privilege when he appeared before a grand jury in Puerto Rico (Tr.1533-34; see also 1526). Defendant's motions for a mistrial were denied (Tr.1534; 1643-45).

Specifically, in cross-examining Mr. Zemen the prosecutor confronted him with grand jury testimony in which he declined to disclose who any of the investors in the Madrid Hotel Corporation were (Tr.1533-34). The propriety of Mr. Zemen's invocation of the attorney-client privilege has never been challenged. Moreover, that assertion of privilege was not the least inconsistent, factually or legally, with anything Mr. Zemen had said at trial. See United States v. Hale, 422 U.S.171 (1975); Grunewald v. United States, 353 U.S. 391 (1957). True, the preceding grand jury testimony read by the prosecutor was arguably proper impeachment. But the final question and answer read related to the defendant's privilege and only served the purpose of inviting the jury's attention to a circumstance which undoubtedly was viewed adversely by some of the jurors. And, again the defendant's silence was emphasized. The panel failed even to address this infringement

of the defendant's rights, perhaps because the argument was included along with other cumulative grounds for reversal. But the result seems at war with the spirit of the Supreme Court's recent Fifth Amendment decision in Doyle v. Ohio, 96 S.Ct. 2240 (1976) and in direct conflict with the Third Circuit's Sixth Amendment right to counsel decision in United States ex rel. Macon v. Yeager, 476 F.2d 613 (3d. Cir. 1973). Rehearing should be granted.

IV

THE PROSECUTOR ELICITED EVIDENCE OF SUPPOSED CRIMINAL ASSOCIATIONS HAVING NO PROBATIVE VALUE BUT PACKING GREAT PREJUDICIAL EFFECT.

The prosecutor may also have planted a seed as to the explanation for the defendant's silence. A bad seed.

First, in his direct examination of Revenue Agent Davidson the prosecutor deliberately elicited that he was assigned to an "Organized Strike Force" (Tr.1243), that he had training in "Strike Force" fraud courses and that this meant investigation of tax returns of alleged members of organized crime. The Court failed to grant a mistrial or strike the testimony but it did tell the jurors that the testimony was not to influence the deliberations (Tr.1243-47).

Then, in cross-examining a Mr. Adorno, the prosecutor asked about a man, Raymond Marquez, whom the prosecutor intended

to argue was closely associated with the defendant: "Mr. Marquez is in the business of running the numbers game, is he not? (Tr.1832). The defendant's motion for a mistrial was denied (Tr.1833). Similarly, the prosecutor again inserted the issue of guilt by association when during rebuttal he repeated the identification of Marquez as a "numbers operator." This occurred in a context in which (a) no one had challenged who Marquez was, (b) his occupation was irrelevant, (c) the prosecutor had just assured the judge that the answer he wanted would be relevant to a proper inquiry, (d) defense counsel objected beforehand, (e) the witness was an FBI agent, and (f) the answer was an alleged admission of the defendant himself. Defendant's motions for a mistrial were denied (Tr.1907-7-8; 1994-95). And, thereafter the prosecution flaunted Raymond Marquez in argument to the jury (Tr.2013, 2018, 2020-21, 2022, 2024; see also 2072, 2073, 2076-77, 2080-81) thus forcing defense counsel also to struggle with this problem (Tr.2038, 2041).

Irrelevant and highly prejudicial testimony hinting the defendant's involvement in organized crime and nunbers operation had no business in this case. Rules 404 and 403, Rules of Evidence for United States Courts and Magistrates. Casting Mr. Rodriguez as the real estate nominee of Marquez was perhaps permissible advocacy; casting Mr. Rodriguez as a partner in

crime was not. e.g., United States v. De Cicco, 435 F.2d 478 (2d. Cir. 1970); United States v. Tomaiolo, 249 F.2d 683, 687-690 (2d. Cir. 1957). As this Court stated in De Cicco, 435 F.2d at 483:

> Little discussion is needed to demonstrate that prior similar acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct, unless it be under a "birds of a feather" theory of justice. Guilt, however, cannot be inferred merely by association.

Here, the association with numbers operations not only impermissably puts the defendant's character in issue before the jury but also conjures poisonous speculation that he may have received unreported taxable income in 1967 from a gambling enterprise.

In short, the prosecution committed reversible error by its persistent efforts which deprived Mr. Rodriguez of his rightful cloak of innocense and instead tarred him in a presumption of criminality. Cf., Estelle v. Williams, 425 U.S.____,19 Cr.L. 3061, May 3, 1976. The panel also failed to address this argument. But it was precisely this sort of prejudicial evidence which required the reversal in United States v. Cecil Robinson, supra. If Defendant's petition were granted he would show that such evidence must be excluded under Rule 404(b) as well as Rule 403, of the Rules of Evidence for United States Courts and

Magistrates -- a discussion which would also be of aid to the Court if it grants a rehearing in Robinson.

CONCLUSION

For each of the foregoing reasons, as well as the other reasons stated in the Brief for Appellant, rehearing or rehearing en banc should be granted.

Respectfully submitted,

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January 1977

CERTIFICATE OF SERVICE

I, JOSEPH BEELER, hereby certify that I have served each party required to be served by mailing 2 copies of the foregoing Petition for Rehearing with Suggestion for Rehearing En Banc on this 24th day of January, 1977 to:

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